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STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

ALBERTA STUDIER, PATRICIA M. SANOCKI,
MARY A. NICHOLS, LAVIVA M. CABAY,
MARY L. WOODRING, and MILDRED E. WEDELL,

Supreme Court
Docket No. 125765

Plaintiffs-Appellants,

vs.

MICHIGAN PUBLIC SCHOOL EMPLOYEES
RETIREMENT BOARD, MICHIGAN PUBLIC
SCHOOL EMPLOYEES RETIREMENT
SYSTEM, MICHIGAN DEPARTMENT OF
MANAGEMENT AND BUDGET, and
TREASURER OF THE STATE OF MICHIGAN,

Court of Appeals
Docket No. 243796

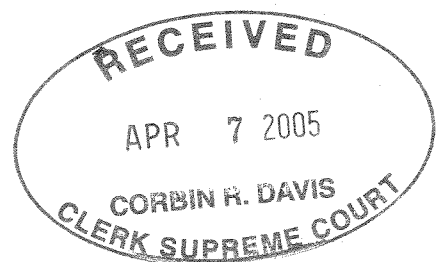
Ingham County Circuit Court
Case No. 00-92435-AZ

Defendants-Appellees.

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PLAINTIFFS-APPELLANTS'
SUBMISSION OF SUPPLEMENTAL AUTHORITY



The attached Opinion of the Oregon Supreme Court in Strunk, et al v Public Employees Retirement Bd, 338 Ore 145; 2005 Ore LEXIS 104 (2005), was issued on March 8, 2005, approximately seven weeks after this Court heard oral argument in the present matter. Plaintiffs-Appellants in Supreme Court Case No. 127565 and Plaintiffs-Appellees in Supreme Court Case No. 127566 (hereinafter Plaintiffs) submit the attached Opinion because it supports and affirms their contention on several critical issues before this Court. In Strunk, the Court consolidated several cases wherein current and former public employees, who were members of the Oregon Public Employees Retirement System (PERS), filed suit challenging several legislative changes made to the Oregon public employee retirement statute. The challenges were, essentially, that changes contained in 2003 amendments to the Oregon public employees retirement statute impaired the contractual obligation the state had previously made to employees and retirees in prior retirement statutes. The Court held the provisions of the 2003 PERS legislation that (1) eliminated the annual assumed earnings rate credit to PERS Tier One members' regular accounts, and (2) temporarily suspended annual COLAs to the service retirement allowances of retired Tier One members, were void and of no effect. The other challenges to the statutory changes were rejected.

Plaintiffs will not attempt to re-brief the issues in this matter, but call the Court's attention to some relevant thoughts, arguments, and decisions in the attached Opinion which bear directly on the issues raised in the present consolidated Studier case.

1. The Court held that on the basis of its numerous past Opinions the retirement statute in Oregon was intended to be contractual. The Oregon retirement statute, like the Michigan Public School Employees Retirement Act, does not contain any provision stating the retirement benefits granted thereunder will not be diminished or taken away.

2. The Oregon Supreme Court's rulings in the attached case were based upon Oregon Const, art 1, §20 which is Oregon's counter-part to Mich Const 1963, art 1, §10, the general non-impairment clause in the Michigan Constitution. The Constitution of the State of Oregon does not have a provision similar to Mich Const 1963, art 9, §24 which specifically protects the accrued benefits of each pension plan and retirement system of that State. Nevertheless, the Oregon Court ruled the retirement benefits are subject to protection from non-impairment under art I, §20 of the Oregon Constitution. Plaintiffs herein contend that the health benefits provided for in Michigan's Retirement Act are protected by the general non-impairment clauses in the Michigan and United States Constitutions. Accordingly, the non-impairment problem presented by Defendants' actions in the present cases does not disappear, even if this Court holds that Mich Const 1963, art 9, §24 is not applicable to health benefits.

3. The Oregon Court held the Legislature's attempt to suspend the annual cost-of-living allowances (COLAs) to the retirement allowances of retired Tier One members was violative of the general non-impairment clause (art I, §20) of the Oregon Constitution. Reaching this conclusion, the Court relied heavily on its decision

in Eckles v State, 306 Or 380; 760 P2d 846 (1988). The Court concluded at 2005 Ore LEXIS 104, p 53:¹

Applying Eckles to the statutory contractual issue before us now, it is indisputable that the promise set out in ORS 238.360(1) (2001) respecting annual COLAs remains part of the PERS statutory scheme applicable to the affected group of retired members. However, by precluding application of annual COLAs to “fixed” service retirement allowances determined for those affected members, Oregon Laws 2003, chapter 67, section 10(3), amounts to a directive from the legislature to PERB to breach the promise set out in ORS 238.360(1) (2001) with respect to those members. We conclude, as petitioners contend, that that aspect of the 2003 PERS legislation breaches a term of the PERS contract. See Eckles, 306 Ore at 400-02 (so explaining in similar circumstances); see also Hughes, 314 Ore at 32-33 (same).

The Michigan Supreme Court in In Re Certified Question, 447 Mich 765; 527 NW2d 468 (1994), dealt with the question as to when statutory provisions become a contractual commitment of the State. This Court in In Re Certified Question, *supra*, stated at 447 Mich 765, 778:

Pertinent examples of statutory provisions that do, and do not, rise to the level of contractual obligations are found in the Oregon Supreme Court case of Eckles, *supra*.

In Strunk, *supra*, the Oregon Supreme Court, relying on its decision in Eckles, *supra*, held that suspending the “retirees” COLA was a violation of the Oregon Constitution’s general non-impairment clause. These Oregon cases, in the end, stand for the very same conclusion reached by the Michigan Supreme Court in Campbell v Judge’s Retirement Bd, 378 Mich 169; 143 NW2d 755 (1966), which Plaintiffs have relied on in their Briefs.

¹The page references to Strunk, *supra*, are the numbers found in the upper right-hand corner of the attached Opinion. The case is too recent to have official reports page citations.

4. Plaintiffs also direct this Court's attention to the Oregon Supreme Court's discussion in Strunk, *supra*, regarding the ability of a legislature to bind succeeding legislatures. At 2005 Ore LEXIS 104, p 28, the Oregon Court stated:

We underscore that the claims presented here, for the most part, concern contract formation and implicate what this court has described as the "significant" proposition that, if certain circumstances are met, "one legislature may bind a succeeding legislature to a particular course of action." *Id.*, at 13. That proposition is significant, in part, because "ordinarily it is the function of a legislature to make laws and not contracts." Campbell, et al v Aldrich, et al, 159 Ore 208, 213; 79 P2d 257 (1938).

In the end, that is what the non-impairment clauses in the Constitutions are about, *i.e.*, binding the government and succeeding Legislatures to their contractual commitments.

5. The Oregon Supreme Court in Strunk rejected the State's economic hardship defense, stating at 205 Ore LEXIS 104, p 46:

First, we emphasize that we are not dealing here with legislation that impairs private contracts. Instead, we are dealing with a statutory contract. In other words, it is one of the *parties* to the contract (the state) that now is attempting to rely on a change in circumstances to permit it to alter its contractual obligations in a constitutional manner.

The Court then referred to provisions in the Special Master's Report, pointing out the merits on both sides of the economic hardship issue and acknowledged that the State's recent financial status is "... both serious and has resulted in substantial detriments to the provision of governmental services across the State." The Court concluded, at 2005 Ore LEXIS 104, p 46:

We accept all those findings. Taken together, however, they do not justify a rewriting of the assumed earnings rate guarantee in a manner that would result in the elimination of

earnings both promised and actually credited over time to Tier One members' regular accounts. We reject respondents' economic hardship affirmative defense and declare Oregon Laws 2003, chapter 67, Sections 5 to 8, as amended by Oregon Laws 2003, chapter 625, Sections 10 to 12, void.

6. Finally, Plaintiffs ask this Court to note that the Oregon Supreme Court decided the complicated issues in Strunk, *supra*, only after having sent the case to a "Special Master" for an evidentiary hearing. The Special Master conducted a two-week evidentiary hearing in which a voluminous record was made, and prepared a comprehensive written report which included recommended findings of fact. (See 2005 Ore LEXIS 104, p 20.) Plaintiffs herein argue that the trial court erred when it granted Defendants' Motion for Summary Disposition without conducting a trial, when there were significant factual issues. Strunk demonstrates how important a complete factual record is when the Court must, as in the present case, decide complex legal issues. It is of particular importance in the present case where there were numerous relevant and critical factual issues.

For the foregoing reasons, Plaintiffs herein respectfully request the Court to carefully review the attached Opinion of the Oregon Supreme Court in Strunk, *supra*.

Respectfully submitted,

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Dated: April 7, 2005

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